



**Issue Date: 12 April 2006**

**Case No.: 2005-RIS-00044**

*In the Matter of*

**U.S. DEPARTMENT OF LABOR,  
EMPLOYEE BENEFITS  
SECURITY ADMINISTRATION,**  
*Complainant*

*v.*

**TILLOTSON HEALTHCARE CORPORATION THRIFT 401(K)  
PLAN AND TRUST,**  
*Respondent.*

### **ORDER OF DISMISSAL**

This matter arises under Section 502(c)(2), 29 U.S.C. § 1132(c)(2), of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. §§ 1001, et seq. and the implementing regulations found at 29 C.F.R. Parts 2520, 2560, and 2570.

A hearing was scheduled in this matter before the undersigned for September 20, 2005, but was continued based upon the unforeseen resignation of the Complainant's attorney. On February 24, 2006 the undersigned wrote to the Office of the Solicitor inquiring as to the status of this matter. In response, the Complainant filed a motion for dismissal of the proceeding on the grounds of mootness and futility. The motion indicates that the Complainant has withdrawn the complaint and any penalty assessed in the matter.

Because no procedures for voluntary dismissals are contained in either the ERISA, or EBSA's implementing regulations at 29 C.F.R. Part 2570, or OALJ's general rules of Practice and Procedure at 29 C.F.R. Part 18, the Complainant's request for dismissal is governed by Rule 41 of the Federal Rules of Civil Procedure.<sup>1</sup> Because the

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<sup>1</sup> Compare *Mosbaugh v. Georgia Power Co.*, 1990-ERA-58 (Sec'y Sept. 23, 1992) (ERA whistleblower complaint adopting FRCP 41 when considering a motion for dismissal).

Respondent had already filed the functional equivalent of an answer when it filed an answer to the notice of determination under 29 C.F.R. §§ 2560.502c-2(g) and 2560.502c-2(h), and when it responded to the Notice of Docketing with a prehearing exchange, dismissal by order of the court under FRCP 41(a)(2) is required.<sup>2</sup>

Under FRCP 41(a)(2), the court must decide whether (1) to allow dismissal at all; (2) if dismissal is allowed, the court must decide whether it should be with or without prejudice; and (3) if dismissal without prejudice is allowed, the court must decide whether any terms and conditions should be imposed. Guiding these determinations is the rule that dismissal without prejudice should be granted unless the defendant will suffer some legal harm.<sup>3</sup>

In the instant case, the Respondent has not filed any objection to dismissal. On the other hand, the Complainant's motion for dismissal represents that the complaint and any assessed penalties have been withdrawn. Although legal prejudice is not shown merely by asserting the inconvenience of defending another lawsuit,<sup>4</sup> I find that the Complainant's representations the complaint and penalties have been withdrawn imply the Complainant's agreement to dismissal with prejudice.

Accordingly, and the above-captioned matter is hereby **DISMISSED** with prejudice.

**SO ORDERED.**

**A**

**JOHN M. VITTON**  
Chief Administrative Law Judge

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<sup>2</sup> Compare *Nolder v. Raymond Kaiser Engineers, Inc.*, 1984- ERA-5 (Sec'y June 28, 1985) (a Rule 41(a)(2) (dismissal by order of the court) was invoked in *Nolder* because the Respondent had filed the equivalent of an answer by requesting a hearing, making a Rule 41(a)(1) dismissal (dismissal without leave of the court) inappropriate).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*